



NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.

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Via electronic filing

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Comments of the National Right to Work Legal Defense Foundation, Inc. Regarding Representation Election Regulations (29 CFR parts 101 and 102, RIN 3142-AA12).

Dear Ms. Rothschild:

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") submits the following comments regarding the National Labor Relations Board's 2014 amendments to its Representation-Case Procedures, 29 CFR parts 101 and 102 (RIN 3142-AA12) ("2014 Election Rule").

The Foundation is a nonprofit, charitable organization that provides free legal aid to employees whose human and civil rights have been violated by the abuses of compulsory unionism. Foundation attorneys represent individual employees in cases involving both representation and decertification elections, as well as in cases involving employees' right to hold deauthorization elections to rescind the compulsory unionism clauses governing their employment. Election cases in which Foundation attorneys are or have been involved include: *Lamons Gasket*, 357 NLRB 739 (2010); *Saint-Gobain Abrasives, Inc.*, 342 NLRB 434 (2004); *Covenant Aviation Security*, 349 NLRB 699 (2007); *Albertson's/Max Food Warehouse*, 329 NLRB 410 (1999); and *Americold Logistics*, 362 NLRB No. 58 (Mar. 31, 2015). Among many other important cases litigated before the Board, Foundation attorneys have secured employees' right to demand a secret-ballot election as a means of challenging suspect card-check recognitions. *Dana Corp.*, 351 NLRB 434 (2007), *overruled by Lamons Gasket*.

The Foundation previously submitted comments opposing the Board's 2014 Election Rule, and those comments are re-adopted and incorporated herein.¹ To summarize those comments, the Foundation opposes the Board's 2014 Election Rules because:

- (1) The shortened time-frame for representation elections adversely affects the ability of individual employees to fully educate themselves about the pros and cons of monopoly union

¹ Comments of the National Right to Work Legal Defense Foundation Regarding Proposed Amendments to the Board's Rules Governing Representation Case Procedures (76 Fed. Reg. 36,812; RIN 3142-AA08) (Aug. 18, 2011), *available at* <https://www.regulations.gov/document?D=NLRB-2011-0002-20249>.

representation, and has hampered the ability of employees opposed to union representation to organize themselves and educate their co-workers;

- (2) Providing employees' personal contact information—including their phone numbers, home addresses, email addresses, and work times—to a union, and thus potentially to their co-workers and other individuals with whom the union shares its information, invades employees' right to privacy and places them in danger of harassment or worse; and,
- (3) The Board should determine the proper scope and composition of a bargaining unit even when less than 20% of the unit a union seeks to represent is disputed.

The Board's 2014 Election Rule should be rescinded for the reasons stated in the Foundation's 2011 Comments. The Board, however, should not completely revert to the representation election regulations that were in effect prior to the 2014 Election Rule. At least three substantial reforms are essential.

First, the Board should eliminate its “blocking charge” policy, which allows unions to file unfair labor practice charges for the purpose of delaying otherwise valid decertification elections.

Second, the Board should adopt rules noting that incumbent unions may lose Section 9(a) representative status unless they recertify majority support at certain intervals.

Third, the Board should eliminate all “election bars” except the one bar specifically mandated by the National Labor Relations Act, 29 U.S.C. §§ 151-69. Board-imposed, non-statutory bars harm employee free choice, and entrench incumbent unions a majority of unit employees oppose.

Lastly, if the 2014 Election Rule is not completely rescinded, the Board should return to the pre-2014 rules regarding the procedures for filing and serving decertification petitions. The 2014 Election Rule requires decertification petitioners to serve on all parties the petition, blank statement of position forms, and a copy of the Board's election procedures. That service requirement complicates the decertification process for individual decertification petitioners and makes it harder to file for an election.

The reforms the Foundation proposes will advance the policy and purpose of the Act—employee free choice—by allowing employees full information and time to make representational decisions.

I. The Board must eliminate its “blocking charge” policy, which allows unions to game the system and prevent decertification elections.

The Board claims that the 2014 Election Rule was justified to “eliminate unnecessary litigation concerning issues that may be, and often are, rendered moot by election results.” 76 Fed. Reg. at 36,817. The Board also justifies pushing many current pre-election issues to post-election hearings because “Congress did not intend the hearing to be used by any party to delay the conduct of such an election.” *Id.* at 36,822. If these rationales have any validity, the Board's blocking charge policy also must be eliminated, because it provides unions with an unfettered license to “game the system” and interminably

delay and block decertification elections by raising issues that can and should be left to post-election challenges.

As with certification elections, all decertification elections should proceed and the ballots counted, notwithstanding any previous or contemporaneous unfair labor practice charges. Any allegations made in such charges can and should be litigated as post-election objections. In no case should unfair labor practice charges be allowed to block or delay a decertification election sought by employees. Moreover, ballots should not be impounded because of such charges.

The Board's "blocking charge" rules, and Regional Directors' reflexive application of them in a significant percentage of decertification elections, ignore the fact that employees may wish to be free from union representation irrespective of any alleged employer infractions. Yet, the Board treats employees like children who cannot possibly make up their own minds. This is wrong. Even assuming, *arguendo*, that an employer actually committed violations alleged in unfair labor practice charges, "[t]he wrongs of the parent should not be visited on the children, and the violations of [the employer] should not be visited on these employees." *Overnite Transp. Co.*, 333 NLRB 1392, 1398 (2001) (Member Hurtgen, dissenting); see *Cablevision Sys. Corp.*, Case No. 29-RD-138839 (June 30, 2016) (order denying review) (Member Miscimarra, dissenting).

The Board's practice of delaying and denying elections has faced judicial criticism. In *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960), the court stated: "[T]he Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented." See *NLRB v. Gebhardt-Vogel Tanning Co.*, 389 F.2d 71, 75 (7th Cir. 1968); see also *T-Mobile v. NLRB*, D.C. Cir. Case No. 17-1065 (March 28, 2018) (Sentelle, J., dissenting).

The Board should take administrative notice of its own statistics, which show that 30% of decertification petitions are blocked, while certification elections are almost never blocked for any reason.² Rather, in the context of challenges to a certification petition, the Board holds the election first and later settles any challenges. If the Board can rush certification petitions to prompt elections by holding all objections and challenges until afterwards, it can do the same for decertification petitions. 79 Fed. Reg. 74308, 74430-74460 (Dec. 15, 2014).

The consistent abuse of the blocking charge policy is well known. It is common sense and human nature that any incumbent (whether a union or politician) wants to remain in power and will do whatever is necessary to block or delay the day of electoral reckoning.

Although the 2014 Election Rule purports to require unions to file "offers of proof" in support of blocking charges, such offers need only contain the names of the witnesses and a summary of each witness's anticipated testimony. In the Foundation's experience, Regional Directors reflexively block

² NLRB, Annual Review of Revised R-Case Rules, <https://www.nlr.gov/sites/default/files/attachments/news-story/node-4680/RCase%20Annual%20Review.pdf>.

elections in all such cases, even when the underlying offers of proof are weak and the charges patently frivolous or false. Two recent cases demonstrate this abusive scenario:

1. In *ADT Security Services (IBEW Local 110)*, Case No. 18-RD-206831 (Dec. 20, 2017) (order denying review), Petitioner Lance Oelrich filed a decertification petition supported by the requisite showing of interest.³ The showing of interest was collected by Oelrich in a hotel parking lot following a regularly scheduled quarterly meeting of his employer. Oelrich collected other signatures on his own time, away from work. His employer had no role in encouraging or supporting the collection of the signatures.

IBEW Local 110, however, filed a blocking charge alleging that the decertification petition was circulated during a companywide mandatory meeting, ostensibly with employer support. The Region immediately and reflexively blocked the processing of the election in order to investigate the union's dubious claims. Oelrich and some of his supporters filed a Request for Review, with affidavits. They also gave additional affidavits to the Board Agent conducting the investigation to prove that the allegations in the union's blocking charges were fabricated. The affidavits unequivocally stated that the employees collected the petition on their own time, without employer support or encouragement. They also noted that the union was falsely claiming that the petition was circulated during a company meeting.

The Union eventually withdrew its unfounded charges against ADT, presumably to avoid their dismissal. Yet, despite the fact that its blocking charges were frivolous, the union's delaying tactics succeeded in preventing a timely election.⁴

2. In *Arizona Public Service Co. (USPA, Local 08)*, Case No. 28-RD-194724 (June 27, 2017) (order denying review), Petitioner Wayne Evans filed a decertification petition on March 13, 2017, supported by the requisite showing of interest.⁵ On March 20, 2017, the Regional Director halted the election based on blocking charges filed by the union that alleged the petition was collected during work time and with employer supervision. The employees who collected the petition filed a Request for Review and submitted affidavits demonstrating they had collected the signatures during non-work time and at non-work locations, away from management personnel. The petitioners also attested to those facts in affidavits given to the Board Agent investigating the charges.

³ All relevant facts are taken from Oelrich's Request for Review, *available at* <http://apps.nlr.gov/link/document.aspx/09031d45825b4be0>.

⁴ ADT eventually withdrew recognition from the IBEW because Oelrich had collected a decertification petition signed by the majority of his co-workers. Given that the employer withdrew recognition, Oelrich withdrew his election petition on January 3, 2018.

⁵ All relevant facts are taken from Evans' Request for Review, *available at* <http://apps.nlr.gov/link/document.aspx/09031d45823f949b>.

The union eventually withdrew its blocking charges on May 31, 2017, and an election was held, which the union eventually lost.⁶ Yet, aided by its dilatory blocking charges, the unpopular incumbent union was able to delay its ouster for nearly three months.

These are just two recent examples of unions filing frivolous charges to strategically delay decertification elections. There is little downside for unions in filing frivolous charges based on false or incorrect statements because: (1) the decertification election will be blocked for several months; and (2) it is possible that in the course of the investigation the Region will find some other legitimate reason to issue a complaint and completely block the election. Investigating blocking charges that are filed only as a delaying tactic wastes both the Board's and the employees' resources and time. In fact, it is much worse for individual employees than the Board, because decertification petitioners often have little ability to navigate the Board's bureaucratic system (unless they secure legal assistance).

For these reasons, the Board must end its unfair "blocking charge" rules, which allow unscrupulous unions to game the system and delay elections at will.

II. The Board should adopt rules requiring incumbent unions to regularly recertify majority support or lose 9(a) representative status.

Union monopoly bargaining powers under the NLRA have always been premised on majority support. Current Board rules, however, overwhelmingly fail to effectuate this principle. In fact, studies of NLRB election data show that the vast majority of employees have never actually voted for the union that ostensibly "represents" them.⁷

To begin to remedy this inconsistency and protect employee free choice under the Act, the Board should limit the duration of a certification. Just as no elected public official enjoys life tenure on the basis of winning one election, no union should maintain the extraordinary powers under Section 9(a) over every worker in the bargaining unit on the basis of just one election.

Under the Foundation's proposed rule, when the certification end point comes, the representative would no longer be deemed to enjoy the support of a majority of employees by virtue of that certification and would cease to be a representative within the meaning of Section 9(a) of the Act unless it provided objective proof (other than prior certification) that a majority of employees still support it as their bargaining representative. As part of rulemaking in rescinding the 2014 Election Rule, the Board should solicit comments on the most appropriate timing of a certification's expiration.

Today, many workplaces unionized decades ago consist primarily, if not entirely, of workers hired long after any "choice" was made to organize.⁸ Since the incumbent union was imposed on them as a

⁶ A rerun election was agreed to after the union filed exceptions to the conduct of the first election. See *Arizona Pub. Serv. Co.*, <https://www.nlr.gov/case/28-RD-194724> (last visited, Mar. 4, 2017).

⁷ James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Foundation *Backgrounder* No. 3126 (Aug. 30, 2016), <http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union>.

⁸ For example, the UAW organized the Detroit automakers General Motors, Ford, and Chrysler between 1936 and 1941, long before any of the automakers' current employees were hired.

result of an organizing campaign that took place years or decades ago, these workers have never engaged in “self-organization, and designation of representatives *of their own choosing*” as is the policy of the Act.

By placing a time limit upon the length of certification, the Board would significantly decrease the instances where employees are represented by a union that was never selected by a majority of current employees in a bargaining unit. This, combined with the following reforms to election bars and decertification processing, would more likely protect employee freedom of association under the Act, including the right not to associate with unions, especially those that may lack majority support.

III. The Board should end all election bars not mandated by the Act.

A. The Act’s guiding principle is employee free choice, and the Board must protect this at every step of the process.

Employee free choice under Sections 7 and 9 is the Act’s paramount objective. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Pattern Makers’ v. NLRB*, 473 U.S. 95 (1985); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring); *see also NLRB v. B.A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271, 284 (4th Cir. 2008) (because the NLRA protects employee free choice, the Board “may not appropriately seek a bargaining order . . . that it knows is contrary to the will of a majority of the employees”).

Section 7 “guards with equal jealousy employees’ selection of the union of their choice and their decision not to be represented at all.” *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001). The cornerstone tenant of Section 9 is that union representation can only be based on *actual* majority support. Under Section 9(a) “[e]xclusive representatives” are “[r]epresentatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes” (emphasis added). Consequently, employee free choice must guide the Board’s actions in implementing the Act.

Despite the Act’s “bedrock principles of employee free choice and majority rule,” *Gourmet Foods, Inc.*, 270 NLRB 578, 588 (1984), the Board has created from whole cloth a number of election “bars” that prevent legitimate employee petitions from being processed and elections from occurring. The Board justifies its bar doctrines on the basis of “industrial stability,” but the bars’ main purpose is to “protect [incumbent] unions from decertification or displacement by a rival union,” *Americold Logistics*, 362 NLRB No. 58, slip op. at *11 (Member Miscimarra, dissenting).

Any notion that the *highest* purpose of the NLRA is to aid incumbent unions or foster “labor peace” is false.⁹ The policy of “encouraging the practice and procedure of collective bargaining,” stated in the

⁹ Section 7 of the Act could not be more clear: “Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all such activities” 29 U.S.C. § 157 (emphasis added). Similarly, Section 8(a)(3) precludes “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3) (emphasis added). Further, Section 9 grants

Act's preamble, 29 U.S.C. § 151, does not mean the Act favors unions or employees who support union representation more than employees who wish to refrain from union representation. Only where a majority of employees freely select union representation is there any policy interest in promoting collective bargaining or "labor stability." *See generally IBM Corp.*, 341 NLRB 1288 (2004) (*Weingarten* rights have no application in a setting where the employees have chosen to refrain from being represented by a union); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 384 (1998) ("Stability, while an important goal of the Act, . . . is not its be-all and end all.") (Rehnquist, C.J., dissenting in part). As former Member Brame cogently stated, the Board must be mindful that "unions exist at the pleasure of the employees they represent. Unions represent employees; *employees do not exist to ensure the survival or success of unions.*" *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (emphasis added).

Collective bargaining is itself entirely predicated on the exercise of employee free choice enshrined in Section 7 of the Act:

[T]he Act itself, in its substantive provisions, gives employees the fundamental right to choose whether to engage in collective bargaining or not. The preamble and the substantive provisions of the Act are not inconsistent. Read together, they pronounce a policy under which our nation protects and encourages the practice and procedure of collective bargaining *for those employees who have freely chosen to engage in it.*

Levitz Furniture Co., 333 NLRB 717, 731 (2001) (Member Hurtgen, concurring).

Labor peace is and must be predicated on the exercise of employee free choice, because the Act does not favor "collective bargaining" between an employer and a union that lacks majority support. *See Int'l Ladies Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgment of § 7 of the Act" than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation); *Majestic Weaving Co.*, 147 NLRB 859, 860-61 (1964) (employer negotiating with minority union unlawful even if conditioned upon union obtaining majority support in the future).

Because collective bargaining is predicated on employee free choice, the Act's policy of promoting stable collective bargaining relationships favors secret-ballot elections when employees desire to change their status quo, not burdensome election bars that prevent expressions of employee free choice. Unless and until the NLRB conducts an election to determine whether employees truly support or oppose union representation, the interest of "encourage[ing] the practice and procedure of collective bargaining" cannot be fulfilled, because the employer-recognized union may in fact lack majority employee support.

The continuing imposition of a minority union does not enhance industrial stability, but weakens it. This was demonstrated in *Rollins Transportation System*, 296 NLRB 793 (1989), in which an employer

employees the right to file an election petition "alleging that a substantial number of employees (i) wish to be represented for collective bargaining . . . or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, *is no longer a representative* as defined in section 9(a)." 29 U.S.C. § 159(c)(1)(A) (emphasis added).

recognized a union even though there was conflicting evidence as to whether employees truly supported that union. The Board recognized that the overriding interest at issue was “employees’ Section 7 rights to decide whether and by whom to be represented.” *Id.* at 794. Accordingly, the Board wisely declined to defer to the employer’s determination as to whether and who should represent the employees, as that would “impose a collective bargaining representative on the employees on the basis of the employer’s action rather than the employees’ free choice.” *Id.* at 795. Instead, the *Rollins* Board recognized that “[a] Board election is the arena for exercise of the employee’s right to free choice, a right closely guarded by the Act,” and ordered that an election be held. *Id.* at 793; *see also Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 537 (D.C. Cir. 2003) (recognizing that “colluding” employers and unions can misuse the contract bar “at the expense of employees and rival unions”).

Because employee free choice is the motivating principle behind the Act, and labor stability is a secondary motive that can only come from employee free choice, election bars that are not mandated by the Act are unnecessary and harmful. The Act contains only one election bar, which prevents holding more than one valid election within a twelve-month period. Section 9(c)(3) of the Act states: “[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.” 29 U.S.C. § 159. Had Congress intended the creation of other election bars, it would have done so explicitly. Because Board-devised election bars inevitably squash valid demonstrations of employee free choice, they should be eliminated. The Board should repeal its three Board-created election bars: the voluntary recognition bar, the contract bar, and the successor bar.

B. The Voluntary Recognition Bar

Absent virtually any reasoning or analysis, in 1966 the Board planted the seeds of what has become known as the “voluntary recognition bar,” with this simple, unreflective sentence:

With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that, like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining.

Keller Plastics, Inc., 157 NLRB 583, 587 (1966).

From that rudimentary ruling mushroomed an unfair and undemocratic “recognition bar” that blocks employees from exercising their statutory right to a decertification election (or otherwise changing representatives) once an employer unilaterally bestows voluntary recognition on a particular union. *See Americold Logistics*, 362 NLRB No. 58, slip op. at *1 (voluntary recognition bar may last over one year even if union and employer delay bargaining); *Lamons Gasket*, 357 NLRB 739 (reinstating modified recognition bar); *MGM Grand Hotel, Inc.*, 329 NLRB 464 (voluntary recognition bar can last for over eleven months).

The Board’s primary function is to conduct representation elections to determine actual majority support. Recognizing the tension between that function and a policy that bars elections after a card check, the Board adopted a modified recognition bar in *Dana Corp.*, 351 NLRB 434. There, the Board provided that a recognition bar would continue for a reasonable period only if: (1) the employer and union notify the Regional office that recognition has been granted; (2) the employer posts a notice of recognition (provided by the Regional Office) informing employees that recognition has been granted and they have a right, during a 45-day “window period,” to file a decertification or rival-union petition; and (iii) 45 days pass without a properly supported petition being filed. *Id.* at 441-43. If a petition was filed during the 45-day window period, the Board would process it.

In *Lamons Gasket*, 357 NLRB 739, a divided Board overruled *Dana*, rejected the *Dana* notice and “window period” approach, and re-established a full “recognition bar” *immediately* upon recognition. The recognition bar now blocks employees from filing a petition from the date of recognition until at least six months after the first bargaining session. *Id.* at 748. Between six months and a year after the first bargaining session, the Board will determine whether a reasonable time to bargain has passed, based on a five-factor test. *Id.*

Unions and employers take advantage of the Board’s current voluntary recognition bar by entering into voluntary recognition agreements that effectively prevent employees from obtaining a secret-ballot election for at least four years. The NLRB must not permit self-interested employers and unions to render the representation procedures of Section 9 unusable and irrelevant, thereby denying the Board its supervisory role in the employees’ selection (or rejection) of union representation.

Americold Logistics, 362 NLRB No. 58, is a good example of how a voluntary recognition bar can be used to deny the Board its supervisory role in the union selection process and how employees’ right to hold a secret-ballot election can be trampled for years. In *Americold*, the employer voluntarily recognized the union as the bargaining agent pursuant to a card check conducted on June 18, 2012. *Id.*, slip op. at *1. However, bargaining did not begin until October 2012—four months after recognition. *Id.* A petition for a decertification election was filed soon after, on November 19, 2012, and dismissed because the Region found that a minimum reasonable period of bargaining had not elapsed under the voluntary recognition bar. *Id.*, slip op. at *2. A second decertification petition was filed on April 8, 2013, and was again dismissed by the Region on the same grounds. *Id.* A third petition was filed on June 28, 2013, more than one year after the union had received recognition from the employer. *Id.* However, on June 29, the union ratified a collective bargaining agreement, potentially barring any election for three more years. *Id.*

The Region processed the third petition and held an election. The Region, however, impounded the ballots after the union appealed the Region’s decision to the Board. In a 2-1 decision, the Board overturned the election, and the Region destroyed the ballots. *Id.*, slip op. at *3-6. The Board found that, despite the fact a year had passed since recognition, because bargaining was delayed, the time period for which to file a decertification petition was also delayed. *Id.* Thus, because of the voluntary recognition bar, the employees were denied an election for a full year after recognition, and were then denied an election for up to three more years because of the contract bar. As former Chairman Miscimarra

recognized in his dissent, the result in that case did not “assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act.” *Id.*, slip op. at *11 (citation omitted).

In addition to the practical problems of denying elections, “voluntary recognition” is an unreliable indicator of actual majority support, as the implementation of *Dana* demonstrated. The post-*Dana* empirical evidence, summarized in Member Hayes’s dissent in *Lamons Gasket*, shows that employees rejected voluntarily recognized unions in *Dana* elections more than one quarter of the time. *Lamons Gasket*, 357 NLRB at 751.

As the Supreme Court long ago recognized, deferring to even a “good-faith” employer determination that a union has majority employee support “would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.” *Int’l Ladies Garment Workers’*, 366 U.S. at 738-39.

This lesson was reiterated in *Nova Plumbing*, 330 F.3d 531, where the Board deferred to a contractual agreement between an employer and a union stating that the union had majority employee support, without any independent verification of the truth of that assertion. The D.C. Circuit reversed, holding that “[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in *Garment Workers*.” *Id.* at 537.

The Board’s “voluntary recognition bar” policy—which denies employees an election for at least the first six months after the first bargaining session when an employer and union aver that recognition was based on majority employee support—repeats the folly identified in *Ladies Garment Workers’* and *Nova Plumbing*. The Board’s failure to conduct a secret-ballot election to determine for itself whether the employer-recognized union actually commands the support of a majority of employees places fundamental employee rights in at least “permissibly careless employer and union hands,” *Ladies Garment Workers’*, 366 U.S. at 738-39, and, at worst, employer-union collusion.

Abolition of the “voluntary recognition bar” is necessary to reestablish the Board’s proper role in the representational process to protect employee rights to freely choose or reject union representation. The Board should correct its election policies to protect the true touchstone of the Act—employees’ paramount right of free choice under Section 7. *See Pattern Makers’*, 473 U.S. 95 (paramount policy of the NLRA is “voluntary unionism”); *see also Lechmere*, 502 U.S. at 532 (“By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.”).

In secret-ballot elections, the Board provides a “laboratory” in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. *See Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948); *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 601-02 (1969); *NLRB v. Sanitary Laundry*, 441 F.2d 1368, 1369 (10th Cir. 1971). In contrast, the fundamental purpose and effect of a “voluntary recognition agreement” is to eliminate Board-supervised “laboratory conditions” and substitute a system in which unions and employers have far greater leeway to pressure employees to accept union representation.

The Board should either eliminate the voluntary recognition bar by allowing employees to call for an election at any time after a voluntary recognition, or revive its ruling in *Dana Corp.*, 351 NLRB at 434.

C. The Contract Bar

Pursuant to the Board's contract bar rules, collective bargaining agreements "of definite duration for terms up to 3 years will bar an election for their entire period," and "contracts having longer fixed terms will be treated for bar purposes as 3-year agreements and will preclude an election for . . . their initial 3 years." *Gen. Cable Corp.*, 139 NLRB 1123, 1125 (1962); *see also NLRB v. Burns Int'l Security Serv.*, 406 U.S. 272, 290 n.12 (1972). During the "contract bar" period, the Board will dismiss all representation petitions unless they are filed during a thirty-day "open period" that begins ninety days and ends sixty days before the contract expires, or during any period following expiration in which no contract is in effect. *See Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1000-01 (1962).

There are three principal reasons why the "stability" of a contract bar should not outweigh employee free choice. First, the contract bar does not guarantee employees an election unless they file during the thirty-day "open period" that falls two to three months before the end of a contract. Unless employees have the foresight and knowledge to plan their decertification far in advance of the contract's expiration, they may have no opportunity to file for an election if their employer and union agree to a contract during the sixty-day insulated period. This small window does not adequately protect the rights of employees to choose their own representative. Indeed, by the time employees learn of their right to decertify, or even begin to contemplate the process, the thirty-day window period may already have passed.

Second, the vast majority of employees never have actually voted for the union that represents them.¹⁰ Given that nearly 94% of union-represented employees have never voted for the union that represents them, it is nonsensical to bar them from voting on the union just because there is a collective bargaining agreement in place. At a certain point, the union, like all elected officials, must lose its irrefutable presumption of majority support—and the current thirty-day window period does not afford employees a sufficient opportunity to challenge that presumption.

Third, barring employees from voting on union representation once a contract is in place does not aid industrial stability because employees may not be able to judge a union's effectiveness until after it agrees to a contract. Employees may reasonably decide that the contract the union negotiated is not advantageous to them. Unions, however, are not required to allow employees to ratify a collective bargaining agreement. *See NLRB v. Darlington Veneer Co.*, 236 F.2d 85, 88 (4th Cir. 1956). If a union and an employer agree to a contract that the employees—the only group the Act is meant to protect—come to dislike, the employees have little recourse against the union because the contract bar prevents them from requesting an election for up to three years. This fact, at the very least, necessitates a modified contract bar of a significantly shorter duration, to allow employees to express their

¹⁰ James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Foundation *Backgrounder* No. 3126 (Aug. 30, 2016), <http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union>.

representational preferences with full knowledge of the collective agreement's terms and the union's effectiveness.

D. The Successor Bar

In *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), a sharply divided Board resurrected the controversial “successor bar” doctrine as part of an effort to entrench incumbent unions and prevent employees from exercising their rights under NLRA Sections 7 and 9. Former Member Hayes properly noted that the Board was simply advancing “the ideological goal of insulating union representation from challenge whenever possible.” *Id.* at 810 (Member Hayes, dissenting).

Decisions like *UGL-UNICCO* ignore the true purpose of the NLRA and fail to recognize the Board's highest calling: to conduct elections and ensure employee free choice *whenever* there is a question concerning representation. The successor bar is a paternalistic notion that employees suffer “anxiety” in corporate reorganizations, *id.* at 804, and are, therefore, incapable of deciding for themselves whether the incumbent union properly represents them.

Before 1981, the Board never had adopted a successor bar doctrine. Indeed, it rejected such a doctrine in *Southern Moldings, Inc.*, 219 NLRB 119 (1975). *See UGL-UNICCO*, 357 NLRB at 803. *Southern Moldings* recognized that in the successor bar context, the successor “stands in the shoes of the predecessor vis-à-vis the [u]nion,” meaning that the union is not entitled to a more secure position with the successor than it had with the original employer. 219 NLRB at 119-20. Thus, if the union had a rebuttable presumption with the previous employer, it is entitled to only that same presumption with the successor. *Id.*

The first time the Board adopted any successor bar doctrine was in 1981 in *Landmark International Trucks*, 257 NLRB 1375 (1981), a decision that was swiftly vacated by the Sixth Circuit in *Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815 (1983). At its next opportunity, the Board adopted the Sixth Circuit's rationale against any successor bar. *See Harley-Davidson Co.*, 273 NLRB 1531 (1985). That remained the state of the law for many years, until a successor bar was again adopted in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), a decision again promptly repudiated in *MV Transportation*, 337 NLRB 770 (2002).

MV Transportation recognized that “the position articulated by the Board in *Southern Moldings* represents the appropriate balance between employee freedom of choice and the maintenance of stability in bargaining relationships.” 337 NLRB at 773. *MV Transportation* also noted that the rebuttable presumption of majority status allows employees “who have firsthand knowledge of, and experience with, the union's ability, attentiveness and performance, properly can determine whether the incumbent union is adequately representing their interests during the period of transition” *Id.* (internal quotations omitted). *UGL-UNICCO*, however, falsely assumes that employees cannot be trusted to make their own representational decisions during uncertain economic times. *See MV Transp.* 337 NLRB at 773 n.12 (“Rather than relying on the employees' own judgments, the Board majority in *St. Elizabeth Manor* appeared to rely on a paternalistic assumption that the employees in a successor employer

situation need the protection of an insulated period . . . to make an informed decision regarding the effectiveness of their bargaining representative.”).

The successor bar mischaracterizes the relationship at issue in a decertification petition. In a decertification petition, the *employees* are attempting to disassociate themselves from the *union*. It simply does not matter that the employer is new to the relationship. Employees already are well aware of the union’s actions and achievements (or lack thereof) and can make an informed free choice as to whether it deserves to stay or go. Moreover, the assumption that employees need to be “protected” from their own decertification petition during a time of transition or uncertainty cannot bear scrutiny, for if it were true, employees should also be denied elections any time the stock market drops, the owner of their company nears retirement age, or when government regulatory agencies enact rules and policies that diminish the profitability of the employer and make continued operations difficult.

Employees should be free to make their own choices about being represented by and forced to pay money to a union they do not support, even during times of economic uncertainty or upheaval. *Lee Lumber*, 117 F.3d at 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (“To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case.”).

In addition to disparaging employees’ judgment and capabilities, the successor bar improperly balances “stability” versus employee free choice. As correctly noted by former Chairman Miscimarra, the successor bar provides no stability because it is impossible to know when the bar starts or ends. *See FJC Sec. Servs. Inc.*, 360 NLRB 929, 929 (2014) (Member Miscimarra, concurring). The successor bar, as defined by *UGL-UNICCO*, lasts for at least six months, and up to one year from the first *bargaining session*, not from the time the successor is first obligated to bargain with the union. Therefore, the successor bar prevents petitions from being filed before the bar’s period even begins to run. Delaying the start of bargaining is a common occurrence, as parties’ first meeting often occurs long after a duty to bargain attaches. *See Americold Logistics*, 362 NLRB No. 58 (parties did not meet until four months after voluntary recognition). Unless employees are privy to what is occurring in bargaining, they may have no idea when the absolute six-month successor bar begins to run.

Even after the absolute six-month bar has expired, a Region may still dismiss a petition for *another* six-month period. During the period between six-months and one year after bargaining begins, a decertification petitioner must show a reasonable time to bargain has elapsed. The Board makes this determination based on a multi-factor test under *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001). Depending on what has happened in bargaining, the bar may last for only six months, one year, or somewhere in between. The reliance on a multi-factor test with shifting results necessitates that employees file multiple petitions, month after month, until they are granted an election. *See, e.g., Student Transp. of Am.*, Case No. 06-RD-127208 (June 5, 2014) (employees in a successor situation filed four different petitions until the Region finally granted an election, which the union lost by an overwhelming vote of 88-13). Moreover, given the complexity of the multi-factor test, employees who wish to oust a union are at the mercy of the Region unless they hire their own attorney. The successor bar should be eliminated completely.

IV. The Board should abandon the requirement that employees filing decertification petitions must serve the petition and other routine Board forms on the employer and union.

Section 102.60(a) of the 2014 Election Rule requires a party filing a petition with a Regional Director to serve on all parties named in the petition: (1) a certificate of service on all parties, (2) a copy of the NLRB's description of procedures in representation cases, and (3) the NLRB's statement of position. The Board attempted to justify these requirements on the basis that these forms are necessary "to ensure the earliest possible notice of the filing of a petition and the Statement of Position requirement." Memorandum GC 15-06; *see* 79 Fed. Reg. 74309 and 74327. Prior to this change, a petitioner merely was required to file with the regional office a decertification petition form with a showing of interest.

These changes have made filing decertification petitions an even more cumbersome activity for individual employees, who are often unsophisticated and without legal representation. It requires unrepresented employees to navigate the NLRB's cluttered website for documents with which they are not familiar and about which the other parties (the union and the employer) likely already know (or have better access to because they usually have legal counsel). In the Foundation's experience, individual employees are often confused and deterred by the new petition filing requirements.

This confusion arises because the Board inadequately explains to individual employee petitioners the process for filing a petition. For example, the NLRB's website page discussing decertification elections makes no reference to the requirement that a petitioner must serve additional documents for the petition to be properly filed.¹¹ Other areas of the NLRB's website make only opaque references to "a petition and associated documents."¹² Only the most motivated employee would learn of these requirements if they made it to NLRB's webpage describing "The NLRB Process," and then only if the employee managed to notice that these requirements are hidden in a drop-down-menu in the middle of a page full of confusing charts.¹³

The National Right to Work Legal Defense Foundation's website lays out the process for potential decertification petitioners, listing the numerous steps petitioners must take just to file a document for an election.¹⁴ But not all potential employee petitioners are going to find the Foundation's website. Moreover, receiving instructions from a third party would be unnecessary if the Board's filing process and explanations were more user-friendly.

In short, the Board should not sacrifice accessibility for speed. The 2014 Election Rule's requirements of the service of documents extraneous to the petition and showing of interest have made filing petitions harder for employees, not easier. Moreover, none of these documents needs to be served by the petitioner, because the Region will serve the same documents in its initial letter to the parties. Given the time sensitivity of many petitions due to the contract bar and thirty-day window period for

¹¹ Decertification election, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-represented-union/decertification-election/>.

¹² Conduct Elections, <https://www.nlr.gov/what-we-do/conduct-elections>.

¹³ The NLRB Process, <https://www.nlr.gov/resources/nlr-process>.

¹⁴ Decertification Election, <http://www.nrtw.org/decertification-election/>.

filing, the Board should make filing petitions easier. At a minimum, the Board should return to the pre-2014 standard that requires a petitioner to only file a petition and showing of interest with the Board.

CONCLUSION

The Board should rescind the 2014 Election Rule, move towards requiring recertification for incumbent unions, eliminate the Board-created blocking charge policy and voluntary recognition, contract, and successor bars because those features of the current representation processes adversely affect the Act's fundamental purpose of employee free choice. And, if the 2014 Election Rule is not completely rescinded, the Board should return to the pre-2014 rules for filing decertification petitions, because the current procedural requirements for filing those petitions are unduly burdensome on individual employees.

Respectfully submitted,

A handwritten signature in black ink, reading "Raymond J. LaJeunesse, Jr.", written on a light gray grid background.

Raymond J. LaJeunesse, Jr.

RJL/abs